No. 00-1831

JAN 4 2002

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. A SPOUSE'S INTEREST IN A TENANCY BY THE ENTIRETY IS A VALUABLE, LEGALLY PROTECTED INTEREST THAT IS SUBJECT TO THE FEDERAL TAX LIEN.

1. This Court has long held that the broad text of the federal tax lien "reveals on its face" that Congress meant to reach "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999) (quoting *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982)). See also *United States* v. *National Bank of Commerce*, 472 U.S. 713, 719-720 (1985). The valuable, legally-protected rights of a tenant by the entirety come within the scope of this broad provision.

Each spouse has a present interest in entirety property that entitles him to reside on the property, to exclude third

parties from the property, to share in the profits of the property, to join or refuse to join in the mortgage, lease, or sale of the property and, upon the sale, individually to receive half the proceeds. Pet. Br. 14 (citing cases); Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified at *id.* § 700.2901(g), (i) (West Supp. 2001); *id.* § 557.71 (West 1988).[1] Furthermore, upon a divorce, the tenants by the entirety become tenants in common, and each has the right to bring an action for partition and sale. See *id.* § 552.102 (West 1998 & Supp. 2001). Each spouse also has a future interest in a tenancy by the entirety, which is the right to receive the property in fee simple absolute upon the death of the other spouse. *Id.* § 554.872(g) (West Supp. 1997), recodified *id.* § 700.2901(g) (West Supp. 2001).

These valuable interests are expressly described as "property" rights under state law (Mich. Comp. Laws Ann. § 700.2901(i) (West Supp. 2001)), and the Michigan Supreme

[1] When entireties property is sold, "the spouses are generally each entitled to a one-half interest [in the proceeds] as tenants in common" unless they "reinvest[] in other similar entireties property within a reasonable period of time." *In re Wickstrom*, 113 B.R. 339, 349 (Bankr. W.D. Mich. 1980); see also *In re Jackson*, 92 B.R. 211, 214 (W.D. Mich. 1989). When the property involved in this case was sold, and the tenancy by the entirety thereby terminated, the taxpayer's "future right to half of the proceeds became a present interest" to which the tax lien continued to attach. Pet. App. 69a (Ryan, J.).

Moreover, in the district court, respondent acknowledged that the tenancy by the entirety had been terminated even *prior* to the sale, when the property was quitclaimed by Don Craft to respondent in 1989. See Pet. App. 3a; J.A. 50-51. That quitclaim, of course, did not destroy the federal lien, which passes with the property and also attaches to the proceeds. See, *e.g.*, *Drye* v. *United States*, 528 U.S. at 53-54; *United States* v. *Bess*, 357 U.S. 51, 57 (1958). "[W]here an estate by the entirety is severed each spouse is deemed entitled to an undivided one-half interest in the equity of the property." *In re Ignasiak* 22 B.R. 828, 830 (Bankr. E.D. Mich. 1982).

Court has held that "each spouse" holding an interest in a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 453 n.10, 456 (1976) ("each spouse" is entitled to "separate notice"). These valuable, legally-protected rights constitute "property or rights to property" within the broad scope of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 56.

2. a. Respondent insists, however, that property held in a tenancy by the entirety belongs to the "marital estate" and that "all that belongs to each spouse is a present right to share use of the property with the other (so long as the marriage lasts) and a future right" of survivorship. Resp. Br. 15. Even if all that belonged to each spouse were the present right to share the use of the property, that would be a sufficient interest to qualify as "property" or "rights to property" for purposes of Section 6321 of the Internal Revenue Code. See Pet. Br. 14-15, 18. A spouse's present interest in entirety property, however, consists of far more than simply the right to share the use of the property: "[a] husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety." Mich. Comp. Laws Ann. § 557.71 (West 1988). A spouse's separate right to receive *half the income or rents* from real or personal property and *half the proceeds upon the sale* of the property is a right that has an obvious "pecuniary value" and is therefore subject to the federal tax lien. *Drye* v. *United States*, 528 U.S. at 60 n.7.

The present case involves the enforcement of the federal tax lien against the delinquent spouse's individual right to receive half of the proceeds upon the sale of the property. See Pet. App. 46a-47a. The application of the tax lien to the valuable right of the delinquent spouse to receive his 50%

share of the proceeds of the sale of the property falls squarely within the precedents of this Court—for it is well established that the right to receive money is a "property" right. *Drye* v. *United States*, 528 U.S. at 58.

b. Because the property involved in this case has been sold, this case does not also concern the application of the federal tax lien against each spouse's *future* interest in entirety property. It is well established, however, that a right of survivorship is a species of "property" or "rights to property" to which the federal tax lien properly attaches. A right of survivorship is a common property right; it exists both for tenancies by the entirety and for other types of joint and separate ownerships. For example, in *O'Hagan* v. *United States*, 86 F.3d 776, 784 (1996), the Eighth Circuit held that the United States has "a valid lien on Mr. O'Hagan's survivorship interest" in jointly owned Minnesota homestead property. The court emphasized that the federal lien in the right of survivorship "provides protection for the government without affecting Mrs. O'Hagan's interests." *Ibid.* (citing W. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L. J. 605, 638 (1968)). See also *In re Arango*, 992 F.2d 611, 613 (6th Cir. 1993); *Napotnik* v. *Equibank & Parkvale Savings Ass'n*, 679 F.2d 316, 319 (3d Cir. 1982); *United States* v. *Jones*, 877 F. Supp. 907, 917 (D.N.J.) (the lien in the taxpayer's interest in jointly held property is "subject to [the] right of survivorship" of the other owner), aff'd, 74 F.3d 1228 (3d Cir. 1995) (Table).[2]

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[2] In a variety of situations, courts have concluded that a conditional right to receive property in the future constitutes a valuable, legally protected right to which the federal tax lien applies. See, *e.g.*, *Leuschner* v. *First W. Bank & Trust Co.*, 261 F.2d 705, 707 (9th Cir. 1958) (citing Restatement of Trusts § 157 (Supp. 1948) (expectation of receiving distributions from a spendthrift trust); *In re Rosenberg's Will*, 308 N.Y.S.2d 51, 57 (N.Y. Surr. 1970) (a trust remainder contingent on surviving to the age of fifty is subject to the federal tax lien). The court explained in *In re Rosenberg's Will* that "the federal tax lien attaches" to "future" as well as present interests because "the statute * * * provides that the tax lien shall be a lien "'upon all property and rights to property'" and "'[r]ights to property include future rights whether equitable, contingent or vested.'" *Ibid.*

Respondent offers no authority for her unsubstantiated assertion (Resp. Br. 16) that the right of survivorship is "too ephemeral" to be subject to the tax lien.[3] In *Drye* v. *United States*, 528 U.S. at 53, 61, this Court held that the ephemeral right of an heir to disclaim (or not disclaim) an intestate estate within the nine months following the decedent's death is subject to the federal tax lien because it is a valuable and legally protected right. Here, as in *Drye*, the obvious economic reality is that the taxpayer's interest in the property is a valuable and legally protected interest.[4] As numerous

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[3] Contrary to respondent's contention (Resp. Br. 39), Prof. Plumb did not condone the immunity of entirety property from the federal tax lien. Instead, he characterized this immunity as a "privileged sanctuary * * * [that] would be difficult enough to justify [even] if it were confined to homestead property * * *." W. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 636 (1968). Prof. Plumb emphasized that "the right to use and enjoy the property, to share in its income, and to take the whole if he or she survives" is a valuable right belonging to each spouse in a tenancy by the entirety, and that "some way should be found to apply" those "tangible property rights" to the tax liability of the defaulting spouse. *Id.* at 637.

[4] The two concurring judges in the decisions below acknowledged that the right of survivorship in a tenancy by the entirety is "a contingent future interest" that constitutes a species of property to which the federal tax lien properly attaches. Pet. App. 41a, 61a-63a. See *id.* at 69a (Ryan, J.) (Under "established precedent," "Don Craft had a separate, attachable, future interest in the tenancy by the entirety.").

An early Michigan case states in *dicta* that "the right of survivorship is merely an incident of an estate by entirety and does not constitute a remainder, either vested or contingent." *Sanford* v. *Bertrau*, 204 Mich. 244, 248, 169 N.W. 880, 881 (1918). Recent Michigan authority, however, establishes that the right of survivorship constitutes an interest in "prop-

courts have emphasized (*Tillery* v. *Parks*, 630 F.2d 775, 777 (10th Cir. 1980) (quoting *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970))):

> [A]ll that section 6321 requires is that the interest be "property" or "rights to property." It is of no statutory moment how extensive may be those rights under state law, or what restrictions exist on the enjoyment of those rights.

c. Relying on what has been described as an "amiable fiction of the common law" (*Tyler* v. *United States*, 281 U.S. 497, 503 (1930)), respondent asserts (Resp. Br. 7, 15, 28) that an interest in entireties property is owned by the marital unit rather than by the individual spouses acting collectively and is therefore immune from the federal tax lien. As discussed in our opening brief (Pet. Br. 22-24), however, this Court has often emphasized that federal tax law is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). Indeed in *Tyler* v. *United States*, 281 U.S. at 503, the Court expressly rejected

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erty" for purposes of state law. See Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified *id.* § 700.2901(g), (i) (West Supp. 2001); *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (1984). Cf. *Albro* v. *Allen*, 434 Mich. 271, 275, 454 N.W.2d 85, 88 (1990). In any event, the proper characterization of a right of survivorship as "property" or "rights to property" for the purposes of the federal tax lien is a question of federal, not state, law. *Drye* v. *United States*, 528 U.S. at 58. "It is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Id.* at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). "Once it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722 (1985) (internal quotation marks omitted). See also Pet. Br. 16-17.

the proposition that federal tax law is bound by the "amiable fiction" that entirety property is owned by the marital unit rather than by the spouses. The Court held in *Tyler* that the "artificial rules" of state law that ascribe ownership of the property to the marital unit do not obscure the reality that each spouse holds individual rights and interests in the property to which the provisions of federal law may directly apply. *Id.* at 503-504.[5] For the reasons detailed in our opening brief, the reasoning of *Tyler* applies directly to the present case. Pet. Br. 23-25.

II. RESPONDENT ERRS IN HER INTERPRETATION OF THE RELEVANT DECISIONS OF THIS COURT AND IN HER INTERPRETATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL TAX LIEN STATUTE.

1. Respondent contends (Resp. Br. 14-15) that the term "property" in Section 6321 should be given a limited definition that she would draw from nineteenth century dictionaries. That argument, however, ignores the numerous decisions of this Court that have clearly held that "[t]he statutory language 'all property and rights to property,' appearing in § 6321 * * * is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720. Accord, *Drye* v. *United States*, 528 U.S. at 56. See also *Glass City Bank* v. *United*

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[5] In *Tyler*, the Court explained that, "[b]efore the death of the husband * * *, the wife had the right to possess and use the whole property, but so, also, had her husband." 281 U.S. at 503. "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment * * *." *Id.* at 504. "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite *accessions* to the property rights of the other." *Ibid.* (emphasis added).

States, 326 U.S. 265, 267 (1945) ("Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.").

Respondent further incorrectly asserts that the "'belonging to' language in the [federal tax lien] statute reenforces" a narrow understanding of the statute.[6] Resp. Br. 15. This statutory language does not bear the weight that respondent would place on it. What "belongs to" a taxpayer who holds entirety property are the actual rights and interests in such property that exist under Michigan law—rights that we have described in detail both in our opening brief (Pet. Br. 13-15) and at pages 1-3, *supra*. Respondent makes no effort in her brief to refute our description of the ample rights that each spouse possesses in entirety property under Michigan law. Instead, respondent simply ignores this fundamental issue entirely.

2. Respondent urges that, when Congress first enacted the statutory predecessor of Section 6321 in 1866, "it was well accepted that creditors could not place liens on real property owned by the entireties to satisfy the debt of one member of the marital unit." Resp. Br. 16. Respondent's

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[6] The statute imposes the federal tax lien "upon all property and rights to property, whether real or personal, belonging to" the taxpayer. 26 U.S.C. 6321. Respondent repeatedly quotes the words "property * * * belonging to the taxpayer" (Resp. Br. 1, 10, 21, 27, 31, 35) using the ellipsis to omit the phrase "or rights to property" that precedes "belonging to the taxpayer" in the tax lien statute. The additional phrase—"and rights to property"—that respondent omits, makes clear that a taxpayer need not have an exclusive or unrestricted ownership for the tax lien to apply. As the court explained in holding that the federal tax lien attaches to the taxpayer's interest in a spendthrift trust in *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996), "when Congress says, as it has done in § 6321, that an unpaid tax 'shall' constitute a lien upon 'all' of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on property that is alienable under state law and on property that is not."

reliance on the rights of creditors under state law, however, is plainly misconceived.[7] This Court has repeatedly held that Congress did *not* intend to incorporate state-law exemptions and that such exemptions cannot prevent the attachment of the federal tax lien. See, *e.g.*, *Drye* v. *United States*, 528 U.S. at 59 ("exempt status under state law does not bind the federal collector"); *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983) (the Supremacy Clause of the Constitution "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions"); *United States* v. *Bess*, 357 U.S. 51, 57 (1958) ("state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States"). See also *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) ("there is no room" in the federal statutes "for automatic exemption of property that happens to be exempt from state levy under state law"). See Pet. Br. 19-21.

3. Although the basic text of what is now the federal tax lien statute was first enacted in 1866, it appears that the earliest decision that addresses whether that statute applies to tenancies by the entirety was issued in 1939. Resp. Br. 23 (citing *Shaw* v. *United States*, 94 F. Supp. 245 (W.D. Mich.)).[8]

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[7] Respondent has cited only one state court decision (and no federal decision) involving a state-law exemption for tenancies by the entirety that predates the enactment of the 1866 predecessor of the federal tax lien statute. Resp. Br. 18 (citing *Thomas* v. *DeBaum*, 14 N.J. Eq. 37 (N.J. Ch. 1861)).

[8] Prior to the burgeoning application of the federal income tax during the first third of the 20th Century, there were relatively few occasions for individuals—who might own property in a tenancy by the entirety—to be subject to the federal tax lien. In this context, there is no basis for (and no relevance to) respondent's assertion (Resp. Br. 23) that the *Shaw* case—which was decided in 1939 and involved taxes due for some preceding year—was the first time that the United States took the position that the tax lien reaches such property. Certainly nothing in the decision in that case supports that assertion. Instead, it appears probable that the United

It was not until the early 1950's that two courts of appeals held that the federal tax lien does not apply to tenancies by the entirety. *United States* v. *Hutcherson*, 188 F.2d 326 (8th Cir. 1951); *Raffaele* v. *Granger*, 196 F.2d 620 (3d Cir. 1952). Respondent errs in claiming (Resp. Br. 23-24) that Congress ratified these early and narrow interpretations of the statute by not expressly rejecting them in enacting the Internal Revenue Code of 1954.

a. As part of the enactment of the 1954 Code, Congress considered but did not adopt a proposed amendment to Section 6321 that would have added a parenthetical phrase to the statute to clarify that the federal tax lien attaches to "property and rights to property" of a delinquent taxpayer "(including the interest of such person as tenant by the entirety)." H.R. 8300, 83d Cong., 2d Sess. § 6321 (1954). The Senate rejected this proposal, not because of any stated disagreement with it, but because it was "not clear what change in existing law would be made by the parenthetical phrase." S. Rep. No. 1622, 83d Cong., 2d Sess. 575 (1954).[9] Respondent nevertheless contends that the failure of Congress to enact this clarifying amendment should be understood as an expression of a legislative intent to ratify the decisions that had then recently held that the federal tax lien does not attach to entirety property. Resp. Br. 25.

States had then (as now) routinely applied its lien to jointly owned property. The district court in *Shaw*, while acknowledging that "the rule in a number of states is to the contrary," rejected the government's claim only because "the Supreme Court of Michigan" had adopted the rule "that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse." 94 F. Supp. at 246.

[9] The Senate Report stated (S. Rep. No. 1622, *supra*, at 575):

> It is not clear what change in existing law would be made by the parenthetical phrase [suggested by the House]. The deletion of the phrase is intended to continue existing law.

It is well established, however, that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). See also *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute"); *United States* v. *Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring ("Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

This Court has, moreover, expressly rejected the argument that "Congress' unwillingness to amend [the statute] in response to * * * [lower court] decisions is evidence that Congress believed that those opinions accurately interpreted [the statute's] scope." *California Division of Labor Standards Enforcement* v. *Dillingham Construction., N.A., Inc.*, 519 U.S. 316, 331 n.8 (1997). Accord, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. at 186. The absence of a statutory amendment to correct the two appellate decisions that had incorrectly interpreted Section 6321 thus clearly does not support the assertion that Congress thereby ratified those decisions.

b. Moreover, in *United States* v. *Rodgers*, 461 U.S. at 702-704 n. 31, this Court addressed and rejected the identical argument that respondent raises here. As the Court explained at length in *Rodgers*, the legislative history of the proposed 1954 amendment to Section 6321 refutes the contention that Congress was of the view that the federal tax lien does not attach to an interest in entirety property. The Court emphasized in *Rodgers* that the House Report de-

scribed the proposed amendment as merely a "clarification" of, rather than a change in, existing law. *Id.* at 703-704 n.31; see H.R. Rep. No. 1337, 83d Cong., 2d Sess. A406 (1954). Indeed, the clarifying amendment drafted by the House Ways and Means Committee clearly reflected the assumption that each spouse *has* a "right to property" in a tenancy by the entirety, for it appended the parenthetical "(including the interest of such person as tenant by the entirety)" to that phrase. See H.R. 8300, *supra*, § 6321.

And, as the Court stated in *Rodgers*, "the Senate rejected that clarification, not necessarily because it disagreed with it, but more likely because it found it superfluous." 461 U.S. at 704 n.31. As the Court concluded in *Rodgers*, the legislative history of the 1954 Code reflects, if anything, the assumption by Congress that the federal tax lien attaches to an interest in a tenancy by the entirety without the necessity of an amendment. *Ibid.*

4. Respondent errs in claiming that the "markedly-broader coverage of property interests susceptible to foreclosure" under the provisions of Section 7403 demonstrates that Section 6321 "was not designed to cover all conceivable interests in property." Resp. Br. 21. In the first place, this argument simply ignores the decisions of this Court holding that the statutory language "all property and rights to property" in Section 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720. Accord, *Drye* v. *United States*, 528 U.S. at 56; *Glass City Bank* v. *United States*, 326 U.S. at 267.

Moreover, the wording of the foreclosure provisions of Section 7403 does not support respondent's contention. Section 7403 permits the government to bring suit "to enforce the lien" of Section 6321 or "to subject any property, of whatever nature, of the delinquent, or in which he has any

right, title, or interest, to the payment of such tax or liability." 26 U.S.C. 7403(a). Respondent claims (Resp. Br. 21) that the latter phrase is broader than the text of Section 6321 and that Section 6321 therefore must *not* reach "every interest in property that a taxpayer might have" (*United States* v. *National Bank of Commerce*, 472 U.S. at 720). As this Court has explained, however, the additional language in Section 7403 addresses situations that do not involve the government's lien, for it "contemplate[s], not merely the sale of *the delinquent taxpayer's own interest, but* the sale of the entire property * * * and *the recognition of third-party interests* * * *." *United States* v. *Rodgers*, 461 U.S. at 694 (emphasis added).

For example, under Section 7403, the government may seek a judicial sale of homestead property in which both the taxpayer and the nonliable spouse have an interest.[10] *United States* v. *Rodgers*, 461 U.S. at 709-711. Section 7403 also enables the government to satisfy a taxpayer's tax liability from property that the taxpayer has fraudulently conveyed to a third party. See, *e.g.*, *United States* v. *Bryant*, 15 F.3d 756, 757 (8th Cir. 1994); *Shades Ridge Holding Co.* v. *United States*, 888 F.2d 725, 727 (11th Cir. 1989), cert. denied *sub nom. Fiorella* v. *United States*, 494 U.S. 1027 (1990); *United States* v. *Smith*, 950 F. Supp. 1394, 1398 (N.D. Ind. 1996). And, Section 7403 enables the government to collect taxes in cases where the taxpayer has property but the federal tax lien is procedurally invalid or where there is as yet no lien because the tax has not yet been assessed.[11] The specialized

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[10] Of course, the nonliable spouse is entitled to compensation for her property interest. *United States* v. *Rodgers*, 461 U.S. at 702.

[11] A federal tax lien does not arise until "the assessment is made." 26 U.S.C. 6322. See also 26 U.S.C. 6203; 26 C.F.R. 301.6203-1. Taxpayers have frequently challenged liens by making procedural challenges to the validity of the assessment. See, *e.g.*, *Hefti* v. *IRS*, 8 F.3d 1169, 1172 (7th Cir. 1993); *Gentry* v. *United States*, 962 F.2d 555, 557 (6th Cir. 1992);

wording employed in 26 U.S.C. 7403 thus does not support respondent's novel assertion—contrary to this Court's precedent—that the term "property" in Section 6321 has a narrow scope.

5. a. Respondent incorrectly asserts that *United States* v. *Drye* holds that a property interest "must" (Resp. Br. 27) be pecuniary in nature, "must" have ripened into a present estate, and "must" be capable of transfer by the taxpayer to another before the federal tax lien can apply. This Court did not adopt the rules that respondent proposes.

Instead, in *Drye*, the Court stated that, "in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' the important consideration is the breadth of the control the [taxpayer] could exercise over the property." *Drye* v. *United States*, 528 U.S. at 61 (internal quotation marks omitted). The Court examined the taxpayer's rights under state law and concluded that his "unqualified right to receive the entire value of his mother's estate * * * or to channel that value to his daughter" indicated that he possessed a sufficient "right to property" for the federal tax lien to attach. At the same time, the Court emphasized that (*id.* at 60 n.7):

> we do not mean to suggest that transferability is essential to the existence of "property" or "rights to property" under that section. For example, although we do not here decide the matter, we note that an interest in a spendthrift trust has been held to constitute "'property'

Geiselman v. *United States*, 961 F.2d 1, 5-6 (1st Cir.) (per curiam), cert. denied, 506 U.S. 891 (1992); *Hughes* v. *United States*, 953 F.2d 531, 535 (9th Cir. 1992); *United States* v. *Chila*, 871 F.2d 1015, 1017 (11th Cir.), cert. denied, 493 U.S. 956 (1989). Some challenges have been successful. See *Huff* v. *United States*, 10 F.3d 1440, 1445-1446 (9th Cir. 1993), cert. denied, 512 U.S. 1219 (1994); *Brafman* v. *United States*, 384 F.2d 863, 867 (5th Cir. 1967).

> for purposes of § 6321" even though the beneficiary may not transfer that interest to third parties. See *Bank One*, 80 F.3d, at 176.[12]

The text of the Court's decision in *Drye* also refutes respondent's further contention that a property interest cannot be subject to the federal tax lien unless it is "a non-personal interest that others (besides the taxpayer) may equivalently enjoy." Resp. Br. 27. The Court characterized the right to inherit in *Drye* as "a right that is indeed personal and not marketable" but nevertheless held that this valuable and legally protected right is subject to the federal tax lien. 528 U.S. at 60.

b. Respondent has also seriously erred in her description of this Court's decision in *United States* v. *Rodgers*, *supra*. In *Rodgers*, the Court held that a federal tax lien could be foreclosed on the interest of a delinquent taxpayer in homestead property even though, under state law, such property could not be mortgaged, sold or abandoned without the consent of the other spouse. 461 U.S. at 685. Respondent asserts that *Rodgers* differs from the present case because the spouses in that case held "separate right[s]" to the property. Resp. Br. 28. This Court, however, plainly did not adopt that rationale in *Rodgers*.[13] Instead, the Court

[12] The case cited by the Court is *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173 (6th Cir. 1996). Other cases have also held that valuable, legally protected interests in property are subject to the federal tax lien even if the taxpayer could not immediately transfer those interests to a third party. See, *e.g.*, *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986); *United States* v. *Rye*, 550 F.2d 682, 684-685 (1st Cir. 1977). See also pages 3-4 & note 2, *supra*.

[13] In any event, as we have shown above, each spouse *does* hold valuable, separate rights in a tenancy by the entirety. See Pet. Br. 13-15; pages 1-3 & note 1, *supra*. Indeed, the precise issue presented in this case concerns the separate right of the delinquent spouse to receive 50% of the proceeds of the sale of the property. See page 3, *supra*; Pet. App. 46a-47a.

held that the fact that the taxpayer was not able to exercise his rights separately from the rights of his spouse was *not* a basis for denying foreclosure of the federal tax lien. 461 U.S. at 700-702. The Court emphasized in *Rodgers* that neither the "homestead estate * * * claimed by a nondelinquent spouse" nor the "state-created exemptions against forced sale" precluded judicial enforcement of the federal tax lien. *Id.* at 701.

Respondent also errs in stating that in *Rodgers* "the majority halfheartedly embraced" her argument that "the lien statute * * * does not cover tenancies by the entirety." Resp. Br. 30. The Court in *Rodgers* plainly did *not* accept that contention. The Court noted that a "line of cases" had held "that, as a result of the peculiar legal fiction governing tenancies by the entirety in some States, no tax lien could attach in the first place because neither spouse possessed an independent interest in the property." 461 U.S. at 703 n.31. The Court observed, however, that in such cases the government was "merely trying to exercise one of the more benign rights of a lienholder" and emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* As we discuss above (page 11, *supra*), the Court in *Rodgers* then reviewed the legislative history of the proposed 1954 amendment to clarify the application of the tax lien to the interest of a taxpayer in a tenancy by the entirety and stated that the failure of the Senate to adopt the amendment appeared not to be "because it disagreed with it, but more likely because it found it superfluous." *Id.* at 704 n.31.[14]

[14] The Court in *Rodgers* also plainly did not embrace respondent's novel proposition that the difference in the wording of Sections 6321 and 7403 indicates that the tax lien statute "was not designed to cover all conceivable interests in property." Resp. Br. 21, 30. See pages 12-13, *supra*; S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 869

These passages in *Rodgers*, which dispute the "line of cases" and the legislative history on which respondent relies, cannot properly be described as a "halfhearted" *acceptance* of her position.

6. Respondent argues that "countless questions" would be raised if the federal tax lien applies to property held in a tenancy by the entirety. Resp. Br. 33. Among the questions raised by respondent are (i) whether the federal tax lien would be subject to the survivorship right of a nondelinquent spouse;[15] (ii) if so, whether the IRS would seek immediate foreclosure in every case like this;[16] and (iii) how the value of the taxpayer's interest is then to be determined.[17]

None of these questions is unique to entirety property. See, *e.g.*, note 17, *supra*. They arise whenever any type of jointly-owned property is subjected to the federal tax lien for the tax debts of only one of the owners.[18] See, *e.g.*,

(1995) ("*Rodgers* * * * renders the entireties bar [to tax collection] hard to defend.").

[15] The answer to this question is ordinarily "yes," because the United States steps into the shoes of the delinquent taxpayer.

[16] As reflected in the facts of the present case and of a long line of similar cases, the answer to this question is "no."

[17] The answer to the valuation issue has factual variations, but the "rough idea" is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698.

[18] Respondent's suggestion (Resp. Br. 32) that the government's position would adversely affect the marketability of titles ignores the fact that the Michigan bar has long warned title examiners that, in view of the 1975 enactment of Michigan's Married Women's Property Act (Mich. Comp. Laws Ann. § 557.71 (West 1988)), it would be risky to ignore a federal tax lien against one of two spouses owning entirety property. See C.A. App. 107-108 (Standard 20.2 of the *Michigan Land Titles Standards* (5th ed.), published by the State Bar of Michigan, Real Property Section). Moreover, in 1983, this Court itself questioned the validity of appellate decisions that had then held the tax lien inapplicable to tenancies by the entirety in *United States* v. *Rodgers*, 461 U.S. at 702-704 n.31.

United States v. *Rodgers*, *supra* (homestead property); *O'Hagan* v. *United States*, *supra* (jointly owned property). The necessity of resolving these issues is simply one of the "practical consequences" of the failure of one of the joint owners to pay taxes as they come due. *United States* v. *Rodgers*, 461 U.S. at 698. These "practical consequences" have not prevented the prompt and efficient application and enforcement of the federal tax lien to every *other* type of jointly-owned property. See Pet. Br. 26-27.

Respondent nonetheless asserts that special treatment is warranted in this case because a tenancy by the entirety is "different" from other types of joint ownership. Resp. Br. 40. As this Court has observed, however, there is "sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). The Court has emphasized that (*ibid.*) (footnote omitted):

> [a] tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each.

7. Finally, respondent incorrectly states (Resp. Br. 12) that the "ready availability of fraudulent-conveyance statutes" demonstrates that the government is "more than amply equipped" to collect tax liabilities. One need look no further than the present case to see the error in that contention. Fraudulent conveyance laws have provided no meaningful assistance to the government in either this case or other similar cases: courts have reasoned that, if entirety property is exempt from creditor execution under state law, then the transfer of that property between spouses cannot

represent a fraudulent conveyance under state law.[19] Pet. App. 81a-83a. For example, in the present case, the United States was able to recover only the small amount of payments made by the taxpayer that enhanced the value of the property while he was insolvent. *Id.* at 85a-86a. That "fraudulent enhancement" theory enabled the government to collect only $6693 of a tax liability which, with interest, exceeds $482,446. *Id.* at 45a, 92a.

Other taxpayers have consciously employed the tenancy by the entirety wholly to avoid their tax obligations. See Pet. Br. 31. It is, as we have stressed, "difficult to conceive of a more simple or widely available method of evading the collection of taxes." *Ibid.* The decision of the court of appeals should be rejected not only because it "contravenes established precedent" but also because it "provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a (Ryan, J.).

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[19] Respondent is also wide of the mark in suggesting (Resp. Br. 12, 22) that the enactment of an unlimited marital deduction for the gift tax indicates that a transfer of entireties property between spouses is a permissible means of tax avoidance. The marital deduction avoids the application of the *gift tax* on the transfer; it does not mean that property to which the federal tax lien has attached because of a delinquency in some *other* tax (such as the income tax) may be transferred free and clear of that lien. See *United States* v. *Bess*, 357 U.S. 51, 57 (1958) ("[t]he transfer of property subsequent to the attachment of the lien does not affect the lien").

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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